SUPREME COURT, U.S.
FILED
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IN THE SUPREME COURT OF THE
UNITED STATES

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GLENN H. SEWELL,

Petitioner,

vs.

PHILLIPS PETROLEUM COMPANY,
a Delaware corporation,
Respondent.

No. 79-985

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# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## STATEMENT OF THE CASE

Respondent, Phillips Petroleum Company, a petroleum producer, entered into a contract with one Eckman for installation of an underground gasoline tank at a service station. Petitioner, Glenn H. Sewell, an employee of Eckman, was working in the excavation when a cave-in occurred, causing injuries for

which this action was brought. The sides of the excavation had not been sloped as required by local law. The question for the trial court was whether the delict of the contractor, in failing to comply with applicable standards, was imputable to the respondent (owner).

The trial court at first held as a matter of law that respondent was insulated from responsibility and granted summary judgment in its favor, but upon reconsideration reversed its position and presented the question to the jury who awarded petitioner a verdict of $25,000.00 compensatory damages.

Petitioner appealed the trial court's dismissal of the claim for punitive damages and respondent cross-appealed contending there were no issues of fact for the jury and that as a matter of law judgment should be entered in its favor no cause of action on plaintiff's complaint. On March 21, 1977, the Court of Appeals handed down its unanimous decision reversing the trial court's judgment and remanding the case for a new trial.

On remand it was stipulated that the liability issue should be decided upon the record made at the first trial. In accordance with the decision of the Court



of Appeals the trial court found that there was no evidence of negligence on the part of respondent and entered judgment in its favor no cause of action. That judgment was also appealed and was affirmed by a panel of different judges on August 24, 1979.

In summary, on the initial appeal, the Appellate Court, after a review of the record, determined that the evidence of negligence was insufficient to carry plaintiff's case to the jury and reversed and remanded. The parties thereafter stipulated that the record made at the first trial could be submitted to the District Court as the basis for his decision on remand. Since the Appeals Court had held that there was insufficient evidence in the record to warrant submission of the negligence issues to the jury in the first trial, it necessarily followed that there was insufficient evidence in the same identical record upon which the trial judge could base a finding on the liability issues in favor of the plaintiff on remand. The District Court, therefore, made the only decision possible under the mandate of the Appellate Court, and on the stipulation of counsel that the case might be decided upon the record

previously made, entered judgment in favor of the defendant, no cause of action.

The second appeal was actually a belated petition for rehearing as recognized in the concurring opinion of Judge McKay.

Sewell's petition for rehearing following the second appeal was denied on September 28, 1979.

ARGUMENT I

PETITIONER HAS FAILED TO RAISE ANY OF THE CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

Rule 19 of the Rules of this Court enumerates the considerations governing review on certiorari. Section 1(b) provides as follows:

> Where a court of appeals [1] has rendered a decision in conflict with the decision of another court of appeals on the same matter; or [2] has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or [3] has decided an important question of federal law which has not been, or should be, settled by this court; or [4] has decided a federal question in a way in conflict with applicable decisions of this court; or [5] has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned, such a departure by a lower court, as to call for an exercise of this court's power of supervision."



The Petition for Writ of Certiorari presents no questions within the above guidelines. The gravamen of petitioner's complaint is "That petitioner's brief simply was not given adequate reading by the Circuit Court when it wrote its opinion . . ." (Pet. 12). This case raises no constitutional issue nor any important question of federal law, nor any conflicting decisions on federal questions. It appears to be nothing more than a disappointed litigant pursuing his last hope of a remedy to the ultimate tribual. This is clearly not a case that merits the time or attention of this Court. It is but one of thousands involving disaffected and disappointed litigants in the federal courts.

If any other point is raised by petitioner it appears to be an ethics complaint, which the Circuit Court found itself not equipped to examine and handle, and which this Court is no better equipped to meet. The Circuit Court referred the matter to the state disciplinary authority for appropriate attention and it

will presumably take whatever action is appropriate. Clearly this is not a matter for the attention of this Court.

## ARGUMENT II

## PETITIONER HAS FAILED TO MAKE A CLEAR AND ADEQUATE PRESENTATION OF THE POINTS REQUIRING CONSIDERATION.

Rule 23 of the Rules of this Court states:

> 4. "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

We submit that a reading of petitioner's brief readily demonstrates a failure to comply with this rule.

## CONCLUSION

Petitioner has not raised any of the considerations governing review on certiorari outlined in Rule 19 of the Rules of this Court. Petitioner has also failed to present with accuracy and clearness what is necessary for an understanding of the points which he raises. The petition for certiorari should be denied.



Respectfully submitted this 22nd day of January, 1980.

CHRISTENSEN, JENSEN,
KENNEDY & POWELL

By _____
Ray R. Christensen
Denton M. Hatch
Attorneys for Respondent

## CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January, 1980, two copies of the foregoing Respondent's Brief in Opposition to Writ of Certiorari were mailed, postage prepaid, to Samuel King, Esq., Attorney for Petitioner, 301 Gump & Ayers Building, 2120 South 1300 East, Salt Lake City, Utah 84106.

Ray R. Christensen
Attorney for Respondent